FEB 4 1983

No. 82-1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PAUL BENDETTI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Petitioner

February 4, 1983

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QUESTION PRESENTED

In addition to the questions presented in the original petition for writ of certiorari, this Supplement presents the following question:

4. Whether, under the Fifth and Sixth Amendments to the Constitution and Rule 44(c) of the Federal Rules of Criminal Procedure, a trial court may deny defendants joint representation by counsel of their choice despite an otherwise valid waiver by each defendant of potential conflicts of interest.*

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* Petitioner considers this question to include the subsidiary question whether the trial court made a proper finding that petitioner did not validly waive the potential conflicts of interest.

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MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully moves that the Court grant him leave to supplement his petition for writ of certiorari to present a new question upon which this Court has, subsequent to the filing of his petition, granted certiorari.

Petitioner filed a timely petition for writ of certiorari on December 21, 1982, seeking review of the judgment of the court of appeals that affirmed his conviction. That petition presents a question about the trial court's rejection of a plea agreement and adopts by reference two questions presented by co-defendants Mastro and DeLamos in No. 82-894. The petition remains pending, although the petition filed by Mastro and DeLamos was denied on January 10, 1983, 51 U.S.L.W. 3509.

Subsequent to the filing of the petition, this Court granted a petition for writ of certiorari in *Flanagan* v. *United States*, No. 82-374, 51 U.S.L.W. 3508 (Jan. 10, 1983). The *Flanagan* case presents two related questions that are essentially the same as an issue rejected on interlocutory appeal—by the same circuit court that decided *Flanagan*—in the instant case: Whether, under the Fifth and Sixth Amendments to the Constitution and Fed. R. Crim. P. 44(c), a trial court may deny defendants joint representation by counsel of their choice despite an otherwise valid waiver by each defendant of potential conflicts of interest.[1]

As the Statement of the Case in the attached Supplement demonstrates, petitioner and his two co-defendants, Mastor and DeLamos, were denied leave to have a single counsel of their choice represent them fully at trial. In an interlocutory appeal pursuant to 28 U.S.C. § 1291 and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), they brought that issue to the court of appeals, which affirmed the trial court ruling.[2] Defendants then petitioned this Court for writ of certiorari, but this Court denied the petition. *Bendetti et al.* v. *United*

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[1] The petition in *Flanagan* states the two relevant questions presented as follows:

> "(1) Whether the [court of appeals'] opinion denying Petitioners counsel of their choice to present their common defense due to potential conflicts of interest, despite a valid waiver of such conflicts, is inconsistent with the decisions of this Court?
>
> "* * * *
>
> "(3) Whether Fed.R.Crim.P. 44(c) permits a court to undercut Petitioners' constitutionally protected choice of retained counsel?"

[2] The question presented on that appeal was:

> "Whether or not the defendants * * * have been deprived of their constitutional right to counsel of their choice and the effective assistance of counsel by the memorandum opinion of the court prohibiting Oscar B. Goodman, Esq., from participating in all stages of the trial of this matter."

States, 452 U.S. 938 (1981) (No. 80-1615). The trial went forward thereafter.

Petitioner and his two co-defendants did not again present the joint-representation issue to the court of appeals on review of their convictions. In part for that reason, the issue was not included in the December 21, 1982 petition for writ of certiorari. In light of the court of appeals' affirmance by order on both appeals and this Court's prior denial of certiorari, it appeared that to present the question again would be a redundant and futile gesture.

Now, however, the Court in *Flanagan* has decided to review a decision by the same circuit that affirmed petitioner's conviction, on an issue that was fully litigated in the trial court and on interlocutory appeal in petitioner's case. See attached Supplement. The instant petition is pending, and there is no jurisdictional bar to consideration of the joint-representation issue, since "it is settled that [the Court] may consider questions raised on [a] first appeal as well as 'those that were before the Court of Appeals upon the second appeal.'" *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964), quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916).

For the foregoing reasons, petitioner respectfully requests that the Court grant him leave to supplement his petition for writ of certiorari with the attached Supplement.

Respectfully submitted,

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES F. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Petitioner Bendetti respectfully requests that the Court grant the petition for writ of certiorari, as supplemented herein, to review the judgment of the court below affirming his criminal conviction in the United States District Court for the District of New Jersey.

OPINIONS BELOW

The opinion of the district court on the question presented herein is reported at 498 F. Supp. 450, and is

reproduced as Appendix A hereto. The court of appeals did not file an opinion on the interlocutory appeal from that decision.

JURISDICTION

The judgment order of the court of appeals affirming, on interlocutory appeal, the district court's pretrial decision on the right-to-counsel issue presented by this Supplement was entered on January 19, 1981. After a timely petition for rehearing was denied on February 17, 1981, this Court denied a petition for writ of certiorari, 452 U.S. 938 (1981) (No. 80-1615). The judgment order of the court of appeals affirming the conviction was entered on September 29, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated October 22, 1982, and a timely petition for writ of certiorari was filed on December 21, 1982.

While the question presented by this Supplement was not presented to the court of appeals again on appeal from the conviction or in the pending December 21, 1982 petition for writ of certiorari, this Court has jurisdiction under 28 U.S.C. § 1254(1), because "it is settled that [the Court] may consider questions raised on the first appeal, as well as 'those that were before the Court of Appeals upon the second appeal.'" *Mercer v. Theriot*, 377 U.S. 152, 153 (1964), quoting *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257 (1916). A prior denial of certiorari does "not establish the law of the case or amount to *res judicata* on the points raised." *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution is quoted in the petition.

The Sixth Amendment to the Constitution provides, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

Rule 44(c) of the Federal Rules of Criminal Procedure provides, in pertinent part:

"(c) *Joint Representation.* Whenever two or more defendants have been jointly charged * * * or have been joined for a trial * * *, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel." [As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; April 30, 1979, eff. Dec. 1, 1980.]

STATEMENT OF THE CASE

A general summary of the proceedings below is found in the pending petition for writ of certiorari. The following statement relates only to the question presented in this Supplement.

At their arraignment on October 10, 1979, petitioner Bendetti and his co-defendants, Mastro and DeLamos, requested that Oscar B. Goodman, Esquire, be permitted to represent the three of them. At that time, the district judge conducted a hearing in which he "thoroughly covered the dangers and risks of multiple representation." 498 F. Supp. at 451; p. 1a, *infra*. Each defendant indicated that he wanted Mr. Goodman to represent him despite the potential conflicts of interest. *Id.* The Government opposed the defendants' request for joint representation. At a later hearing on November 5, 1979, the

district court ordered that each defendant obtain separate counsel by November 19, 1979, and that "each such separate counsel * * * evaluate the case of his client and determine whether Mr. Goodman's continued representation of the three defendants through the pre-trial phases of this matter constitutes a conflict of interest * * *." *Id.* at 453; p. 6a, *infra.*

On December 10, 1979, the district court held another hearing, attended by defendants and their separately retained counsel, at which the joint-representation issue was discussed. At the conclusion of the December 10 hearing, the district court permitted Mr. Goodman to participate in the pretrial proceedings only in a limited adviser or "general counsel" role, and reserved the question whether the court would permit him to appear in any capacity at all at trial. *Id.* at 454; p. 9a, *infra.* The district judge further stated that he would allow defendants an opportunity to be heard at the time of trial in the event that they renewed their application to have Mr. Goodman appear jointly for all three of them. *Id.* at 454-55; p. 10a, *infra.*

Seven months later, on July 29, 1980, defendants' separately retained counsel appeared before the district court and again raised the question of Mr. Goodman's participation at trial. *Id.* at 455; p. 11a, *infra.* Defendants' counsel made clear that "[d]efendants all want [Mr. Goodman] in the case * * *. The defendants want to know * * * why, first of all, they can't have one attorney represent them, since it's what they wanted from the beginning * * *." Tr. July 29, 1980, p. 17. The court's ruling—as explained in its later written opinion—did not permit Mr. Goodman to replace the three separately retained counsel; it did not permit Mr. Goodman to make a joint opening statement or joint summation for the three defendants; and it allowed Mr. Goodman to examine witnesses only on technical matters

and only if all separate counsel as well as all defendants agreed that he could best handle a particular witness or legal argument. 498 F. Supp. at 456-57; p. 15a, *infra*.

Defendants filed a notice of appeal on August 28, 1980, from the district court's ruling refusing to permit Mr. Goodman to participate fully in all stages of the trial on behalf of all three defendants. A motion for stay of proceedings pending this appeal was filed in the district court on August 29, 1980, and was granted on September 3, the same day the district court entered a written opinion on the joint-representation issue. In that opinion, the court recognized that defendants ordinarily should be permitted to have counsel of their choice. *Id.* at 456; p. 13a, *infra*. Nonetheless, the court concluded that defendants would be "far better represented by separate and independent counsel," and that it was not satisfied that defendants' waiver of the potential conflicts of interest was a knowing and intelligent one. *Id.*

The issue was presented to the court of appeals on interlocutory appeal, and the court affirmed by order on January 19, 1981.[1] A timely petition for writ of certiorari was denied by this Court, 452 U.S. 938 (1981) (No. 80-1615), and the case proceeded to trial.

At trial, defendants were represented by their separate counsel. As set out in the pending petition for writ of certiorari, defendants were convicted on multiple counts, and the court of appeals affirmed. The joint-representation issue was not raised by defendants on their post-conviction appeal.

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[1] The court of appeals apparently entertained the appeal as an interlocutory appeal of a collateral order pursuant to 28 U.S.C. § 1291 and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *United States* v. *Flanagan*, 679 F.2d 1072, 1073 n.1 (3d Cir. 1982), *cert. granted*, No. 82-374, 51 U.S.L.W. 3508 (Jan. 10, 1983), and cases cited therein.

REASONS FOR GRANTING THE WRIT

As the accompanying motion explains, this case presents a question essentially identical to the issue on which this Court granted a petition for writ of certiorari to review in *Flanagan* v. *United States*, No. 82-374, 51 U.S.L.W. 3508 (Jan. 10, 1983), *decision below*, 679 F.2d 1072 (3d Cir. 1982). This question is whether, under the Fifth and Sixth Amendments to the Constitution and Fed. R. Crim. P. 44(c), a trial court may deny defendants joint representation by counsel of their choice despite an otherwise valid waiver by each defendant of potential conflicts of interest. The *Flanagan* petition demonstrated that the circuits are in conflict on this issue, and petitioner will not repeat those arguments here.

As petitioner now demonstrates, there is no material distinction between the issues presented by the instant case and by *Flanagan*, and, in any event, *Flanagan* is potentially dispositive of the instant case. Certiorari should be granted and this case should be set for argument with *Flanagan*. Alternatively, this case should be held pending decision in *Flanagan* and, if the judgment in *Flanagan* is reversed, certiorari should be granted and this case should be reversed and remanded for reconsideration in light of *Flanagan*.

In *Flanagan*, the four defendants chose to present a common defense to the conspiracy charge against them, and retained the same law firm to represent them. 679 F.2d at 1073. At the Government's request, the district court conducted a hearing to determine whether defendants were aware of the risks of joint representation and of their rights to separate representation. *Id.* The court found that defendants had been apprised by their lawyer of the potential risks associated with joint representation, and then questioned each defendant to ascertain whether he understood those risks. *Id.* It was determined that each defendant understood the potential

conflicts of interest presented by joint representation, and that each defendant knowingly and intelligently had chosen to waive any claim of conflict of interest. *Id.* Nonetheless, because the court also found that a conflict of interest was very likely to arise in the course of the proceedings, it held that defendants' waivers did not have to be accepted. Relying on Fed. R. Crim. P. 44(c), the court ordered that the defendants' chosen lawyer be disqualified from representing any of them. The defendants appealed this adverse ruling, and the United States Court of Appeals for the Third Circuit affirmed. *Id.*

While the *Flanagan* court completely barred defendants' chosen lawyer from representing any of them during pretrial and trial proceedings, the district court here authorized Mr. Goodman to participate only in a limited role at trial. Nonetheless, the issue presented in *Flanagan* and in this Supplement is whether a district court may interfere in any substantial fashion with defendants' choice of counsel once otherwise valid waivers of potential conflicts of interest have been expressed. Petitioner and his co-defendants sought full representation by Mr. Goodman at trial, not the limited involvement authorized by the district court.

Furthermore, while the *Flanagan* trial court found that defendants had made an otherwise knowing and intelligent waiver of potential conflicts of interest, the district judge here stated that he "cannot say that the 'waivers' made by the defendants Bendetti, Mastro and DeLamos are knowledgeable and intelligent under *Johnson* v. *Zerbst*, 304 U.S. 458 * * * (1938)." 498 F. Supp. at 455; p. 12a, *infra.* If that ruling were in fact independent of the district judge's own assessment of the potential for conflicts of interest and if it were supported by adequate findings and evidence, it might distinguish this case from *Flanagan.* But it was neither. The court clearly felt—and repeatedly stated—that defendants would be better served by each having his own separate and independent

counsel. *Id.* at 455-56; pp. 12a-14a, *infra*.[2] Moreover, its opinion lacks any basis for a determination that defendants had not knowingly and intelligently waived the potential conflicts of interest presented by joint representation. Indeed, the facts as presented by the court, viewed in light of the standards of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), show otherwise.

As recognized in *Johnson* v. *Zerbst*, *supra*, the determination whether a defendant has made a knowing and intelligent waiver with respect to a right-to-counsel question must in each case depend upon the particular facts and circumstances, including the background, experience, and conduct of the defendant. 304 U.S. at 64. In this case, as stated above, the trial court "thoroughly covered the dangers and risks of multiple representation"

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[2] The court stated:

> "There can be no doubt that at trial these defendants are better served by each having his own separate and independent counsel. * * *
>
> "Indeed, given what is so obvious to me, and was accepted by Goodman and the defendants in November, I am mystified by the desire that Goodman be permitted to take over the defense of all three of these defendants. * * * Finally, in situations of multiple representation, the district judge is handicapped by the restrictions upon his ability to explore into the defenses of each defendant * * *.
>
> "* * * *
>
> "Yet I cannot escape the persistent notion that there is more here than meets the eye. Why, I must ask, do all the defendants want Goodman to represent them at every trial stage when it is so clear that their interests are better served by each having his own separate and independent counsel?"
>
> "* * * *
>
> "* * * I can say that defendants, at trial, will be far better represented by separate and independent counsel than by Goodman."

498 F. Supp. at 455-56; pp. 12a-14a, *infra*.

with each defendant. 498 F. Supp. at 451; p. 1a, *infra*. There is nothing in the record to indicate that the background, experience, or conduct of any of the defendants would allow for other than a knowing and intelligent waiver once they were apprised by the court of the potential conflicts of interest. Moreover, for at least 10 months prior to the filing of the district court's final ruling on the joint-representation question, each defendant had been represented and advised by separately retained counsel. *Id.* at 453-55; pp. 7a-9a, *infra*. Indeed, the court stated that it "accepted" the assurances of those counsel that each "has substantial experience in trying criminal cases." *Id.* at 454; p. 10a, *infra*. It seems apparent, then, that the district court in this case improperly substituted its views regarding joint representation for those of defendants, and did not feel bound to accept a knowing and intelligent waiver of potential conflicts of interest by separately represented defendants.

Any doubts that the court's waiver finding was not in fact separate from the trial judge's own views about joint representation are dispelled by that judge's expressed views in an earlier case, *United States* v. *Garafola*, 428 F. Supp. 620 (D.N.J. 1977), which he cited in the opinion below (498 F. Supp. at 455 & 456; pp. 11a & 13a, *infra*.) In the *Garafola* decision, he stated that "[t]here can be no real waiver" of the potential conflicts of interest arising from joint representation. 428 F. Supp. at 624.[3]

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[3] The district court below also cited *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978), for the applicable legal principles. 498 F. Supp. at 455; p. 11a, *infra*. There, the court of appeals stated:

> "More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him. * * * It may well be true, then, that in many cases the trial judge will not be in a posi-

Thus, if the *Flanagan* decision is reversed, and this Court rules that defendants may, in appropriate circumstances, waive the potential conflicts of interest posed by joint representation, then these defendants—separately represented by counsel at the time they sought joint representation—were improperly denied the right to joint representation by counsel of their choice, and the judgment of the court of appeals should be reversed.[4]

---

tion to accept a waiver of effective assistance of counsel. [Footnoted omitted, citing *United States* v. *Garafola, supra.*]

"* * * *

"Finally, exercise of the court's supervisory powers by disqualifying an attorney representing multiple criminal defendants in spite of the defendants' express desire to retain that attorney does not necessarily abrogate defendant's sixth amendment rights." 570 F.2d at 1181-82.

The Government relied on *Garafola* and *Dolan* in its Brief for Appellee in the court of appeals, and *Dolan* was relied upon by the court of appeals in deciding *Flanagan*. See 679 F.2d at 1075 & 1076. This interrelationship of decisions demonstrates that a decision by this Court in *Flanagan* is likely to be dispositive of the joint-representation issue in this case.

[4] The fact that petitioner did not raise the question presented in this Supplement on his post-conviction appeal should not bar this Court's consideration of that question. While the general rule is that issues neither raised before nor considered by the court of appeals ordinarily will not be considered by this Court, *e.g., Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), that rule is inapplicable here. As explained above, the district court's ruling denying defendants joint representation by counsel of their choice was appealed before trial by defendants. When the court of appeals affirmed, defendants presented the question to this Court by a petition for writ of certiorari, and the Court denied that petition. Thus, this is not a case where the question here presented was never raised before nor considered by the courts below; nor is it a case in which no record exists. The fact that petitioner did not present the same question a second time on appeal should not prejudice this Court's consideration of that question after the Court has subsequently granted certiorari on another decision presenting that question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted on the question presented by this Supplement. Alternatively, the petition should be held pending decision in *Flanagan* v. *United States*, No. 82-374, and, if the judgment in *Flanagan* is reversed, the petition should be granted, the judgment below reversed, and the case remanded for further proceedings in light of *Flanagan*.

Respectfully submitted,

STEPHEN J. POLLAK
(Counsel of Record)
JOHN TOWNSEND RICH
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Petitioner

February 4, 1983

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Criminal No. 79-321

UNITED STATES OF AMERICA

v.

PAUL BENDETTI, DENNIS MASTRO, PETER DELAMOS, and JAMES VITO MONTEMARANO,
Defendants.

September 3, 1980

On October 10, 1979, six defendants in the above-captioned matter were arraigned before this court. On the motion of Elliott H. Vernon, Esq,. Oscar B. Goodman, Esq., was specially admitted to this district in order that he be permitted to represent three of the defendants: Paul Bendetti, Dennis Mastro and Peter DeLamos. After all of the defendants were arraigned, pursuant to *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973), I conducted an inquiry concerning the advantages, disadvantages and conflicts of interest arising from Mr. Goodman's joint representation of the three.

This *Hart v. Davenport* hearing was conducted on October 10, 1979. Tr. 14 *et seq.* I thoroughly covered the dangers and risks of multiple representation. Each defendant, *Id.* 39, indicated he wanted Goodman to represent him during the pretrial stage.

Significantly, I pointed out the dangers in three defendants, charged as here with conspiracy, having the same counsel. *Id.*, 19-20. Goodman responded that he was aware of the problem and said:

> . . . it would be my intention, your Honor, that if this court would permit me to remain in the case

> that at the time of trial each of the defendants would be represented by separate counsel.

Tr. 20, lines 16-19.

Goodman held out to me that as an attorney from Las Vegas he was able to provide the defendants during the pretrial stage expertise other counsel lacked:

> . . . I have found throughout the years that gentlemen who are associated with Las Vegas, who are represented by attorneys who do not come from Las Vegas, when those gentlemen are charged with cases involving Nevada law, involving casinos, involving skimming, involving hidden ownership, that the attorneys who don't live there have done their clients a disservice by taking those cases because they're unable to relate to the jury the atmosphere and the flavor of Las Vegas and how business is done there.
>
> I would respectfully suggest to the court that with these gentlemen having independent counsel at the time of trial that certainly they would be entitled no less at this point in time to have a Nevada attorney who is familiar with Nevada rules and regulations and laws go through the pretrial matter. . . .

Id. 28, lines 2-16.

This intimation of expertise, accompanied by Goodman's reiteration of his recognition that each defendant should have independent counsel at trial, led me to conclude that hearing by permitting him to represent the three defendants [Bendetti, Mastro and DeLamos] at the arraignment. I stated:

> . . . based on all I've heard I will make a finding, a *Hart v. Davenport* finding that as I indicated in the *Garofola* opinion given the limits that are imposed upon my ability to inquire at this point I cannot say that there is a conflict in interest between the three defendants represented by Mr. Goodman, And, therefore, I will permit him to stay in the case.

In view of the extensive recordings counsel indicated were involved, I set a liberal motion schedule and a tentative trial date in January 1980.

At the conclusion of the October 10 hearing, Frederick Polak, Esq., the attorney for the United States, stated he would file a formal notice of disqualification directed at Goodman. This led to another hearing, on November 5, 1979.

Polak there stated that he had been hampered in discussing immunity and cooperation with Goodman's clients because of the multiple representation. Tr. of November 5, 1979, 3; that Goodman represented an unindicted co-conspirator; that government information, made available to Goodman, indicated that his own clients saw themselves differing in their degrees of culpability; that it was impracticable to allow Goodman to make all the pretrial motion decisions and thus "lock in" the independent trial counsel Goodman had recognized would be necessary; and that the case was a complicated one, covering three years, over 100 overt acts, with the probability of numerous unforeseen developments during pretrial and trial. *Id.*, 3-6. Polak concluded:

> We believe that the longer Mr. Goodman is in the case the longer these defendants will be affected. To act now will save potential continuances, mistrials, perhaps appellate attacks, and permit an individual attorney representing each one of these defendants to review the discovery materials fully and make an independent determination of what motions they can make in the defendant's best interest.

Id. 6, lines 10-16.

Goodman once again emphasized his expertise in connection with "the Nevada situation," and that he "should be permitted to remain in the case if for no other reason at least until such time as the validity of the wiretaps is challenged." *Id.* 13, lines 12-18.

Once again he noted his understanding that Bendetti, DeLamos and Mastro would "have independent counsel representing their interests at the time of trial." *Id.* 13, lines 21-22. Goodman did not file a sworn denial of Polak's affidavit averring he, Polak, had discussed with Goodman granting immunity to one of his clients in return for getting his cooperation against the others. *Id.* 16-17. There was, however, this exchange:

> THE COURT: All right. I take it—and you told me that you have taken up with them the necessity that they will have to have separate counsel at trial.
>
> MR. GOODMAN: Absolutely.
>
> THE COURT: And they're agreeable to that?
>
> MR. GOODMAN: They are. I wouldn't let them do it any other way.

Id. 17, lines 9-15.

Thereafter I dictated the following into the record:

> I have read Court Exhibit 1 and Court Exhibit 2 [these were sealed at Goodman's request] and for the life of me I just cannot perceive how in the face of, A, the delicacies of the problem; B, the law as it stands today, and given the trend of—the direction of trend for tomorrow and everything we've covered at the last Hart hearing; and finally what's in these Court Exhibits 1 and 2 how Mr. Goodman wants to stay in this case. Compounding all of the problems that we have is the fact that *Mr. Goodman himself acknowledges that he can't try this case for three defendants, and each one has been so advised by him and each one has agreed that they would get separate counsel at trial.*
>
> Now, what's the consequence of that? I have been told in the papers submitted to me this is a case of unusual complexity. Figures like thousands of

hours of tapes have been thrown around this courtroom. I can perceive without exercising much imagination that when Mr. Goodman finally decided it was time to bow out and bring in trial counsel what would then happen? And rightly so. Trial counsel would say, "We can't be ready. This is a case of unusual complexity. There are thousands of hours of tapes that we're going to have to listen to. There are thousands of documents in Nevada and here that we're going to have to examine. Judge, our clients have a Sixth-Amendment right to have counsel represent them who are familiar with the case. And while we have a great deal of respect for Mr. Goodman, his reputation has preceded him here, nonetheless we have to do this job independently."

Now, if Mr. Goodman wants to stay in this case as sort of a general counsel for these three defendants, founded upon his knowledge of the peculiar features of the case that he feels enable him to serve the three people so well, he's going to have to do this as well. Each one now is going to have to get separate counsel and then the assessment can be made by each of the individual counsel as to the extent to which Mr. Goodman can remain in the case representing the three defendants.

And on that basis, Mr. Goodman, I will permit you to remain in the case.

MR. GOODMAN: Very good.

THE COURT: On any other basis I will not be able to do it.

MR. GOODMAN: That was anticipated, your Honor, and discussions have been ongoing with other counsel.

THE COURT: All right. And I will direct further that given all of the problems of discovery in

this matter that that be done within the next two weeks.

And I think, Mr. Polak, you can discuss with Mr. Goodman the form the order should take. Do that out in the hall. Get the order prepared, get it submitted to me today and we'll get it filed. [emphasis supplied.]

Id. 35, line 5-37, line 3.

My reasoning was, as is reflected by the record, that the defendants would derive benefit from Goodman's claimed expertise in Nevada matters during pretrial but that each defendant would have to retain, then and there, counsel who would represent him at trial. Goodman's response, in the presence of Elliott H. Vernon, Esq. [who was retained shortly thereafter by DeLamos] and the three defendants [Bendetti, Mastro and DeLamos] indicates not only an understanding but an acquiesence in that ruling. An order was filed on November 5, 1979 as follows:

This matter having been opened to the Court by Frederick B. Polak, Special Attorney on behalf of the United States, for an Order disqualifying Oscar B. Goodman, Esq. from the representation of the three defendants Paul Bendetti, Dennis Mastro and Peter DeLamos.

IT IS on this 5 day of November, 1979,

ORDERED and ADJUDGED that each of the three defendants, Paul Bendetti, Dennis Mastro and Peter DeLamos are to obtain separate counsel in this matter by November 19, 1979; and it is further

ORDERED and ADJUDGED that each such separate counsel must evaluate the case of his client and determine whether Mr. Goodman's continued representation of the three defendants through the pretrial phases of this matter constitutes a conflict of interest; and it is further

ORDERED and ADJUDGED that such decision be made known to this Court as soon as practicable.

Following retention of separate counsel I held still another hearing on December 10, 1979, to assure that the representation as arranged protected the rights of the defendants and was free of conflict. Tr. of December 10, 1979, 12.

Vernon had originally appeared as local counsel, with Goodman, for all three defendants. Now he was representing only DeLamos. Questioning of the defendants and counsel for Bendetti and Mastro indicated there was, at this early juncture, no reason for not permitting Vernon to represent DeLamos. *Id.* 13, 16-17. *See* Vernon letter to the court, December 4, 1979, Court Exhibit 6.

Having approved Vernon's position as counsel for DeLamos, I put this question:

> THE COURT: All right. Now, is the fact that Mr. Goodman remains in the case to represent all three of the defendants in some manner that I have not yet penetrated to, is that acceptable to you?
>
> MR. VERNON: It certainly is, your Honor. I perceive no conflict. He's here as a general counsel predicated upon the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada.

Id. 17, lines 13-20.

Further questioning elicited that Frank T. Swain, Esq., had represented DeLamos in a state investigation in New Jersey at the request of Goodman. Counsel and the parties, however, assured me that they consented to his representing Bendetti here; and I saw no basis, in the record before me, for barring Swain.

Next, I asked each counsel to state what he perceived Goodman's role to be. While each counsel asserted he had considerable criminal trial experience, it appeared each

felt that Goodman's presence, even at trial, as a sort of adviser or "general counsel," was deemed desirable because of his experience in "Las Vegas gaming," "RICO wiretapping," and, as noted by Vernon, "the intricacies of Nevada law and casino gambling laws emanating from the state of Nevada." *Id.* 17, 21.

Nonetheless, counsel indicated they would not be displaced by Goodman:

> THE COURT: Who's going to make the final decision on what your client—what is best for your client, you or Mr. Goodman?
>
> MR. VERNON: My client is going to make that decision.
>
> THE COURT: Who gives him the advice?
>
> MR. VERNON: I will give him the advice.
>
> THE COURT: And not Mr. Goodman?
>
> MR. VERNON: Not Mr. Goodman.

Id. 20, lines 3-11.

John J. Momot, Esq., essentially saw Mr. Goodman's role as I have just defined it:

> The case deals with many issues dealing with RICO wiretapping and gaming regulations in which I, knowing Mr. Goodman for many years, recognize that he is very, very well-qualified in this area and I personally would be looking to him for expertise in this area to assist in my representation of Mr. Mastro during the coming motions and trial itself.
>
> THE COURT: You don't feel qualified to do it without Mr. Goodman's help?
>
> MR. MOMOT: I do feel qualified; however, I do understand his expertise in this area—
>
> THE COURT: In what area?

MR. MOMOT: Especially gaming, your Honor.

THE COURT: You mean Las Vegas gaming, Nevada gaming?

MR. MOMOT: Las Vegas gaming, yes, your Honor. And I think he would be of great assistance not only to counsel involved in this matter but to any and all defendants.

THE COURT: Mr. Swain.

First, let me just ask Mr. Momot one question. Excuse me just a minute.

MR. MOMOT: Yes, sir.

THE COURT: As you heard his role stated by Mr. Vernon, is that your understanding as well?

MR. MOMOT: That is my understanding, your Honor.

Id. 20, line 22, to 21, line 22.

I concluded the hearing by dictating the following into the record:

> Now, with respect to Mr. Goodman, let me say this. Given the responses I have received I will permit Mr. Goodman to remain in the matter in the role, Mr. Goodman, as you have described that role up to the point of trial. I will reserve at this point on whether I will permit him to appear at trial. I'm doing this for two reasons. First, I want to be sure that at the time trial begins, if, as you put it, it reaches that stage, all counsel and the three defendants will have an opportunity once again to express to me what their thinking is as regards Mr. Goodman appearing at trial and representing all three of the defendants.
>
> Secondly, I want to be in a position to say at that point that based upon the case as I know it and as I hear about it from counsel at that point, that there is

in fact nothing but good that can flow to each of those defendants from having Mr. Goodman appear in the role as has been defined for him by you here today.

Among the factors I will have to consider at that time will be what may be the appearance to a jury of Mr. Goodman appearing for all three of those defendants.

Now, this means, therefore, since I am reserving on this at this point, that each of the three counsel that represents the three individual defendants here today will have to be prepared to the hilt to go forward without any assistance from Mr. Goodman at trial in the event I judge that to be necessary.

I am assured by each one of the three of you that you are, in fact, qualified by virtue of your own experience to handle these cases in the event Mr. Goodman should be barred. Each of you has told me he has substantial experience in trying criminal cases and I'm satisfied with your assurances. I accept those assurances and I am satisfied with them.

I do not see the potential for harm in Mr. Goodman remaining in the case through the pretrial stages that I perceive there may be in his appearing at trial for the three defendants. But I am not ruling him off the reservation for trial. I'm simply reserving on it at this point. And I will, of course, hear from each of the defendants and from counsel at the time of trial in the event you renew your application at that point to have Mr. Goodman appear for all three of the defendants at trial.

Id. 30, line 13, to 32, line 4.

Thereafter, pretrial matters unfolded and the case was set for trial on September 10, 1980 as defendants required additional time to prepare.

On July 29, 1980, counsel were before me on various matters and the question of Goodman's participation at trial was raised. One issue related to the defense designation of the electronic tapes they intended to use at trial. I had ordered that this information be furnished so that questions of audibility and authentication could be resolved before trial.

One defense counsel stated that the tapes were in Las Vegas and "until the government puts its case in or commences this case, we don't know what tapes we're going to utilize." Tr. of July 29, 1980, 10, lines 16-17.

I stated that I had long ago required the government to provide copies of the recordings it was going to use, with transcripts, that technical evidence matters were being heard on those pretrial, and that the defense had to respond in kind. I noted that the defense was not being asked to forego surprise—the tapes they had were furnished to them at my direction by the State of New Jersey in cooperation with the United States. *Id.* 9-11; 13-16.

Further, referring to the fact the tapes were in Las Vegas, I noted that I was holding New Jersey counsel responsible for conforming to my order. I extended the date for compliance to August 13, 1980.

Thereafter, I dealt with Goodman's trial status. Before dealing with what Goodman's role at trial is to be, a discussion of applicable legal principles is appropriate. No elaborate review is necessary.

Counsel have been referred by me to *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978) and *United States v. Garafola*, 428 F. Supp. 620 (D. N.J. 1977). I take it to be the law of this circuit that where the district court cannot satisfy itself that there has been a proper waiver of the Sixth Amendment right to effective assistance of counsel, he need not and, indeed, probably should not accept it. *United States v. Dolan, supra*, 570 F.2d at 1181.

I have meticulously probed into the matter on more than one occasion. Yet I cannot say that the "waivers" made by the defendants Bendetti, Mastro and DeLamos are knowledgeable and intelligent under *Johnson v. Zerbst*, 304 U.S. 458 (1938). The averments made by the United States on its motion heard last November have never been specifically denied. Moreover, the pretrial developments support the fact that these defendants may have differing interests and may have engaged in varying activity with respect to the principal government witness, the decedent Russo [whose testimony will be largely in the form of electronic recordings].

There can be no doubt that at trial these defendants are better served by each having his own separate and independent counsel. *Fryar v. United States*, 404 F.2d 1071, 1073 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969).

Indeed, given what is so obvious to me, and was accepted by Goodman and the defendants in November, I am mystified by the desire now expressed that Goodman be permitted to take over the defense of all three of these defendants. *See* Notice of Motion for Stay of Proceedings Pending Appeal, p. 2, indicating an appeal is being taken from my decision "refusing to permit Oscar B. Goodman, Esq., to participate in all stages of the trial of this matter on behalf of the defendants, Bendetti, Mastro and DeLamos. . . ." The situation is made even more puzzling by the fact that not once but several times Goodman agreed that, at trial, the defendants would have separate counsel, that they understood this, and that they were agreeable to this. Finally, in situations of multiple representation, the district judge is handicapped by the restrictions upon his ability to explore into the defenses of each defendant, the facts respecting each, what the government will offer as to each, what evidence will be offered by each, how each will want his defense conducted, how each will [with his counsel] want cross-

examination conducted of witnesses implicating him or of witnesses implicating co-defendants but not him.

The reasons for separate and independent counsel are stated in Geer, Conflict of Interests and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119 (1977).

Simply by way of example, if a government witness implicates defendant A, but not defendant B, what is their joint counsel to do? He must shake the witness' testimony as to A, perhaps even suggesting that the witness is not credible. On the other hand, must he not, at some stage, note that the witness has not implicated B?

In the face of the "stonewalling" here by Goodman, a district court is placed in a difficult position. Defendants ordinarily should be permitted to have counsel of their choice. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1093 (3d Cir. 1976). *Cf. Cuyler v. Sullivan*, 48 U.S.L.W. 4517 (U.S. May 12, 1980); *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979). Yet I cannot escape the persistent notion that there is more here than meets the eye. Why, I must ask, do all the defendants want Goodman to represent them at every stage when it is so clear that their interests are better served by each having his own separate and independent counsel?

This same nagging question has been dealt with in other places. *See United States v. Garafola*, *supra*, 428 F. Supp. at 624 n. 7 and 627, citing and quoting from a paper by Alan T. Cole, Esq., former chairman of the Section of Criminal Justice, American Bar Association; and *see* ABA Standards Relating to the Defense Function, § 3.5(b) at 159, 211, and 214. *See also*, *United States v. Quinones*, 613 F.2d 47 (3d Cir. 1980); *United States v. Provenzano*, 620 F.2d 985, 1004 (3d Cir. 1980).

While I cannot say that the reasons advanced in the Cole paper, as quoted in *Garafola*, are present here, I can say that defendants, at trial, will be far better repre-

sented by separate and independent counsel than by Goodman. I can also state that I cannot satisfy myself that their "waiver" is a knowing and intelligent one.

Accordingly, I will not permit Goodman to replace Vernon, Swain and Momot as counsel for the three defendants.

What role, if any, may Goodman perform at trial? Notwithstanding the fact that I have been given no specifics, as I was in connection with pretrial matters, the theme continues that Goodman has certain special expertise that defendants will require at trial, this notwithstanding Vernon, Swain and Momot are experienced in criminal defense work and were retained at a time when, as I have stated, the defendants and Goodman had agreed they would be trial counsel.

Nonetheless, I can accommodate the claimed necessity for Goodman's expertise with the defendants' right to separate and independent [and effective] counsel under the Sixth Amendment.

I will permit Goodman to continue in his role as counsel to the three defendants so that he will be available as an adviser to the three counsel when and if they need this aid. He can, of course, sit at counsel table to be readily available. I emphasize, however, that I regard Messrs. Vernon, Momot and Swain as counsel for DeLamos, Mastro and Bendetti, respectively. In this way I can assure that trial decisions made by a defendant and his counsel will be made not in the light of how they serve all three, but rather how they serve that particular defendant.

At the hearing on July 29, 1980, I was asked to detail specifically what Goodman would be permitted to do at trial, Tr. of July 29, 1980, 16, *et seq.* I have reviewed what I there stated; and now, upon reflection, believe amplification of my remarks is appropriate.

Opening Statements: It is impossible to predict at this stage whether one or all of the defendants may want to waive opening, and if they open what the opening should comprise. Nonetheless, it is clearly in the best interests of each defendant that his own lawyer open for him. Goodman will not be permitted to open jointly for the three defendants.

Summation: The procedure and the reasons therefor are as they are set forth under "Opening Statement." Indeed, common sense and experience dictate that at the conclusion of the trial each defendant will have, at the very least, different shades of emphasis on argument, if not totally different arguments, and in making such must have his own case presented undiluted by arguments from his counsel which are addressed to the case against—and for—the other defendants.

Witnesses: Much of this aspect has to be handled on an ad hoc basis, witness by witness. If a technical matter arises, e.g., an aspect of electronic surveillance, and all counsel and their clients are satisfied that Goodman can best handle direct or cross of that particular witness, I will, after appropriate inquiry, permit him to do so, acting for all three defendants, with appropriate instructions being given to the jury. If on cross, his examination will be in place of all three counsel, not in addition to the examinations performed by counsel.

Legal arguments: If all three defendants' counsel agree that a particular legal argument can be best presented by Goodman, and their clients agree, I will permit him to make such, again, where the jury is present, after appropriate instruction is given to the jury.

Submit an order conforming with the foregoing.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2313

UNITED STATES OF AMERICA

v.

PAUL BENDETTI, DENNIS MASTRO and PETER DELAMOS,
Appellants.

Appeal from the United States District Court
for the District of New Jersey

Before: WEIS and HIGGINBOTHAM, *Circuit Judges* and MCCUNE, *District Judge.**

After considering the contentions raised by appellants, to-wit, that the trial court denied the appellants their constitutional right to counsel of their choice and denied them the effective assistance of counsel by refusing to allow Oscar B. Goodman, Esquire, to participate in all stages of the trial of this matter, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Weis
Circuit Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

DATED: Jan. 19, 1981

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* The Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2313

UNITED STATES OF AMERICA,
Appellee,

v.

PAUL BENDETTI, DENNIS MASTRO and PETER DELAMOS,
Appellants.

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*, and MCCUNE, *District Judge.**

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Weis
Judge

Dated: February 17, 1981

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* The Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.